Supreme Court, U.S.
FILED
AUG 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORD MOTOR COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER FORD MOTOR COMPANY

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August 1987

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On behalf of its member companies, the Motor Vehicle Manufacturers Association (MVMA) submits this brief *amicus curiae* in support of Ford Motor Company's petition for a writ of *certiorari* in the above case.[1] The decision below is reprinted in the appendix to the Ford petition.

INTEREST OF *AMICUS CURIAE* MVMA

The Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA) is a voluntary non-profit association of companies engaged in the manufacture and sale of

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[1] By letters filed with the Clerk of the Court, both Ford Motor Company and the United States have consented to the filing of this brief.

motor vehicles in the United States.[2] MVMA's members assemble more than 98 percent of the cars, trucks and buses produced in the United States, and operate more than 300 manufacturing facilities. MVMA submits this brief in support of petitioner Ford Motor Company.

This case poses an issue of vital importance to the MVMA's members: may a federal agency enforce State-promulgated environmental regulations that the State's own courts have declared to be invalid *ab initio*? The regulations at issue in this case were promulgated by the State of Michigan pursuant to the Clean Air Act, which was intended to accommodate economic growth with progress in reducing air pollution. *See Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984). The decision below, which upholds an attempt by the federal Environmental Protection Agency to enforce the Michigan standards despite their invalidation by the Michigan court, creates a conflict in the circuits and involves important and recurring issues affecting MVMA members concerning the effect which federal courts should give to a State judicial determination under the Clean Air Act.

STATEMENT

In this case, a Michigan state court entered a final judgment vacating, as of the date of its adoption, a State emission limitation applicable to Ford. The State court found that the limitation was originally adopted in the belief

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[2] The Motor Vehicle Manufacturers Association of the United States, Inc. is an incorporated not-for-profit trade association which has no parent companies, subsidiaries or affiliates. Its members are: American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Manufacturing, Inc.; M.A.N. Truck & Bus Corporation; Navistar International Transportation Corp.; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

that it was achievable through the use of reasonably available control technology (RACT), and that in fact the limitation was not and is not achievable using such technology. There is not a shred of evidence in the record to dispute that determination. With the adoption procedure having been found to be fundamentally flawed, the State court determined that the limitation was void *ab initio*. The Sixth Circuit, however, held that the United States may nonetheless maintain an enforcement action in federal court under the Clean Air Act for alleged noncompliance with this State emission limitation even after it had been vacated by the state that adopted it.

The decision below raises major issues of national importance that are likely to recur. The Sixth Circuit's decision raises fundamental questions as to the enforcement of the Clean Air Act, the relationship between EPA and the states in implementing the Act, as well as practical questions of great importance to the regulated community. Before turning to the facts of this case, we briefly describe the statutory framework and background.

A. The Central Role Of The States In Implementing The Act

The Clean Air Act, as adopted in 1970 and revised in 1977, creates an important federal-state partnership. In the 1970 Act, Congress increased federal authority and responsibility for achieving air quality goals. The states were required to attain federally specified air quality standards within particular periods of time. The statute expressly preserves an important principle, however:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . . " 42 U.S.C. § 7407(a).

A central mechanism to implement the Clean Air Act involves the formulation by each state of a plan for the implementation, maintenance, and enforcement of the national air quality standards within each region in the state.[3] Implementation plans are adopted by the states and submitted to EPA for review, and within four months EPA must either approve or disapprove all or part of the plan.[4] A plan validly adopted by a state and approved by EPA is enforceable by both the federal government and the state.

It is important to underscore that the Clean Air Act gives EPA no authority to question the wisdom of a state's choices of emission limitations if the plan otherwise satisfies the requirements of the Act. As this Court emphasized in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79 (1975), "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

B. The Consideration Of Technological And Economic Feasibility Under The Act

The Clean Air Act amendments of 1970 established a new beginning in air pollution control. Since the 1970 Act was passed, the nature of the program has been affected by

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[3] A state's implementation plan ("SIP") must include emission limitations, schedules for compliance, and such other measures as may be necessary to ensure attainment and maintenance of the national standards. 42 U.S.C. § 7410(a)(2).

[4] If a state fails to submit a plan within the time prescribed, or submits a plan that the Administrator determines not to comply with the requirements of the Act, the Administrator shall promulgate a plan for that state. 42 U.S.C. § 7410(c). Such an EPA promulgation is subject to notice and comment requirements as well as judicial review, 42 U.S.C. §§ 7607(b) and (d).

federal and state judicial decisions, regulations, and legislative amendments.[5] The need to consider technical and economic feasibility has been an important factor in these developments.

Following the initial submission of state plans, litigation ensued on a variety of issues. One series of cases concerned the availability of variances where prompt compliance was unduly burdensome or impracticable. There was a conflict in the circuits on this issue. In *Train* v. *NRDC*, *supra*, the Supreme Court held that variances could be treated as revisions to a plan under the Act and freely approved by EPA so long as national standards would be attained.

The second major issue to reach the Supreme Court involved the question as to whether EPA should consider technological or economic infeasibility in deciding whether to approve state plans. Once again, there was a conflict among the circuits on the issue, and the Supreme Court granted *certiorari* to provide guidance as to the role of economic and technological factors. In *Union Electric Company* v. *EPA*, 427 U.S. 246 (1976) this Court resolved the conflict by holding that EPA has no power to reject a state implementation plan on the ground that it is technologically or economically infeasible for particular sources to comply. The state, if it so wishes, is free to impose more stringent conditions than the Clean Air Act requires. Thus, the decision held that a party may not in federal court challenge the approval of a state plan on grounds of technological or economic infeasibility. This Court also explained that there

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[5] *See* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), affirmed by an equally divided court *sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973); Alabama Power Company v. Costle, 636 F.2d 323 (D.C. Cir. 1979); Chevron U.S.A. v. NRDC, *supra*.

are other ways in which such claims of infeasibility may be raised. In particular, the Court noted that a company dissatisfied with a state plan "may be able to take its claims of economic or technological infeasibility to the state courts." 427 U.S. at 266-67.

Following the *Union Electric* decision, the Clean Air Act amendment of 1977 further underscored the importance of technological feasibility in achieving the Act's objectives. The 1977 amendments to the Act provide that SIPs must require existing major plants to achieve such reductions in emissions as may be achieved by application of "reasonably available control technology" or "RACT." 42 U.S.C. § 7502(b)(3).[6] Issues as to technological and economic feasibility thus continue to be of considerable legal as well as practical importance in implementing the Clean Air Act through the SIP process.

C. The Decision Below And Its Impact

This case concerns Ford's plant in Mount Clemens, Michigan, which provided 85 percent of Ford's North American requirements for vinyl-coated materials. In October 1984, Ford filed suit in State court challenging a State plan regulation (Michigan Rule 610) applicable to this plant, contending that the rule was not technologically and economically feasible.[7] The suit prompted further State administrative proceedings, which concluded—after an extensive inquiry by the Michigan Department of Natural Resources and a public hearing before the Michigan Air

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[6] This case involves existing sources subject to RACT. Major new or modified sources (not involved here) must also achieve technology-based emission reductions. *See* 42 U.S.C. § 7475(a)(4) ("best available control technology"), and § 7503(2) ("lowest achievable emission rate"), applicable to attainment and nonattainment areas, respectively.

[7] Appendix to Ford petition at 27a-28a.

Pollution Control Commission—that the regulation was not achievable through the use of reasonably available control technology (RACT). Upon review of the administrative record, the State court issued a final judgment in March 1985, finding that Rule 610 did not represent RACT and vacating the disputed SIP rule as of the date of its adoption.[8]

Pursuant to 42 U.S.C. § 7413, the United States had commenced an enforcement action against Ford to enforce Michigan Rule 610, which action was pending as of the date of the State court decision. Ford moved for judgment on the pleadings in U.S. District Court, on the ground that the State court judgment left Rule 610 unenforceable. The District Court dismissed the complaint, holding that the State court decision was controlling. On appeal, the Sixth Circuit reversed, holding that the State judgment did not bar federal enforcement. The Sixth Circuit treated the State court decision as if it were only an application to EPA to revise the SIP, and held that the revision is ineffective until approved by EPA.[9]

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[8] *Id.* at 23a. The court ordered Ford to comply with modified emission limits adopted by the State agency.

Independent of the State court judgment, the Michigan Air Pollution Control Commission submitted a revised SIP containing new emission limits. This revision has been pending for 2½ years. *See* n.12 below. We agree that these new limits are not federally enforceable until approved by EPA. This case concerns the validity of federal enforcement of the prior limitations that have been vacated by the State court.

[9] The United States argued in its reply brief in the court below that the significance of the State court judgment was diminished because the parties had stipulated for entry of a consent order. However, the State entered into the stipulation after concluding that all of its own potential witnesses supported Ford's position that a mistake had been made in promulgating Rule 610. (*See* Appendix to Ford petition at 59a-60a). As a result, nothing in the Sixth Circuit's decision turned on whether the State court judgment was rendered after trial or on consent.

The decision of the Sixth Circuit leaves EPA free to ignore a state court decision holding invalid a plan provision on the ground that it is not technologically and economically feasible, and to commence an action in federal district court to enforce the plan provision. The decision below vitiates an affected company's right to judicial review of the technical and economic feasibility of a Clean Air Act state implementation plan.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for *certiorari* for three reasons traditionally warranting plenary review. First, the decision below creates a conflict in the circuits and has upset settled expectations concerning the effect of state court review of SIPs. Second, the decision below raises major constitutional issues of federalism and due process that can be authoritatively resolved only by this Court. Third, the decision below raises a problem of nationwide importance under the Clean Air Act that will continue to arise in federal courts unless resolved by this Court.

I. The Decision Below Creates A Conflict In The Circuits And Departs From Prior Decisions Of This Court

The decision below is in direct conflict with the decision of the Seventh Circuit in *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983). That decision held that the Clean Air Act "does permit a successful state court challenge to render an implementation plan provision unforceable in both federal and state court." *Id.* at 1148. In the *Sierra Club* case, the state court held invalid certain SIP provisions on the grounds that they were adopted without observance of required procedures. The Seventh Circuit affirmed the dismissal of a suit by the Sierra

Club to enforce these SIP provisions in federal court, holding that the rulings of state courts must be given effect. The court also noted that several federal decisions have encouraged regulated companies to take their SIP challenges to state courts. *Id.* at 1149-51.

The court below attempted to distinguish the *Sierra Club* case on the ground that the Seventh Circuit's decision involved a SIP found invalid on procedural grounds by a state court.[10] This distinction is not meaningful, since the reasoning of the Seventh Circuit is not limited to procedural errors. Instead, the *Sierra Club* decision focuses on the role of the state courts in deciding issues as to the validity of state plans, and the corresponding obligation of federal courts to give effect to such state court rulings. Moreover, there is no basis for distinguishing—as the Sixth Circuit attempted—between procedural and "technical" invalidity in this context. Quite obviously, a regulation can be invalid *ab initio* on both grounds.[11]

The *Sierra Club* decision explicitly intended to "align [the Seventh] Circuit with the holding in *Celotex*." 716 F.2d at 1151. The *Celotex* case involved a SIP provision that had been held invalid in state court on grounds similar to those involved here, namely that the state had failed adequately to consider the "technological feasibility and economic reasonableness of the regulations." *Illinois* v. *Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981). The District Court dismissed portions of the complaint which sought to enforce the invalidated provision, holding that an unusual and inconsistent scheme would result if the state court ruling

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[10] Appendix to Ford petition at 6a.

[11] *See, e.g.*, Cumberland Medical Center v. Secretary of Health and Human Services, 781 F.2d 536, 538 (6th Cir. 1986).

were not given effect. Thus the decision below conflicts with the Seventh Circuit's decision in the *Sierra Club* case.

The decision below is also contrary to the suggestion by this Court in *Union Electric*, *supra*, that challenges to the technological and economic feasibility of SIPs should be brought in state courts, and may not be raised in a federal challenge to EPA's approval of a SIP. If SIP provisions are federally enforceable despite state court invalidation, state court review becomes meaningless.[12]

II. This Case Presents Major Issues Of Federalism, Comity, And The Implementation Of The Clean Air Act

The Clean Air Act is a federal-state partnership, in which the states have the primary role in establishing emission limitations. This division of responsibility under the Act was highlighted by this Court in *Train* v. *NRDC*, *supra*:

> "The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. . . . The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan

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[12] The Sixth Circuit asserted that meaning could be given to the state court decision as the first step in the SIP revision process. Appendix to Ford petition at 8a. Suffice it to say that the Ford SIP revision has now been pending for more than 2½ years without any final agency action. *See* n.8 above. Meanwhile, EPA contends that it can continue to enforce the old SIP and collect penalties of up to $25,000 per day of violation during the period of EPA's delay. *See* text at n. 22-24 below.

which satisfies the standards of § 110(a)(2) . . ." 421 U.S. at 79.

Consistent with the central role of the states, this Court in *Union Electric* suggested that a party aggrieved by a SIP raise claims of technological or economic infeasibility in state courts. 427 U.S. at 266-67. Ford brought just such a State action, and succeeded in obtaining a judgment holding invalid the applicable State SIP. The result was that the State regulation in question was void as a matter of State law. Consistent with the federal-state scheme under the Clean Air Act, the rule should not be federally enforceable. The Sixth Circuit's decision is totally inconsistent with the primary role of the states under the Act, as well as the opportunity for judicial review in state courts.

It is a basic constitutional principle that federal courts should not interfere with the operation of state courts. *See Younger* v. *Harris*, 401 U.S. 37 (1971). The Sixth Circuit's refusal to give effect to the final judgment of a state court raises similarly serious issues of federalism and comity. The Sixth Circuit was aware that its decision raised "full faith and credit" issues, but brushed these concerns aside, suggesting that the Clean Air Act somehow overrides these principles.[13] However, it is absurd to think that Congress would have intended that a Clean Air Act SIP, "the product of a joint federal and state effort under the same Act, would be enforceable in the courts of one level of government but not the other." *Sierra Club* v. *Indiana-Kentucky*, *supra*, 716 F.2d at 1151.

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[13] Appendix to Ford petition at 7a.

EPA's position violates the requirements of consistency or, if you will, neutral principles of law.[14] The issue is: "Does state law control the content and validity of State adopted SIPs?" The answer must be yes, since EPA cannot determine that a SIP was properly adopted and approvable in the first place except by reference to state law.[15] If state law controls as to the "validity" of a state plan, then an authoritative state determination as to "invalidity" is also controlling. The fact that a state SIP is federally enforceable should not, by itself, change the principle that state law governs the validity of SIPs.[16]

What the Sixth Circuit failed to appreciate in this case is that the statutory framework of the Clean Air Act was meant to create a basic choice of law rule for Clean Air Act enforcement. The general statutory source of authority for such enforcement is the federal Clean Air Act itself, but the specific limitations that provide the basis for detailed regulation are provided by state law. In related contexts, the

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[14] "The demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim." H. Wechsler, *Principles, Politics and Fundamental Law* p. xiii, quoted in A. Bickel, *The Least Dangerous Branch*, p. 50 (2d Ed. 1986).

[15] In order to be approved, a state plan must contain emission limitations that are promulgated and enforceable under State law. 42 U.S.C. § 7410(a)(2)(B), (F); 40 C.F.R. § 51.11. To be approvable, and thus federally enforceable, a SIP must be enforceable by the state.

[16] The government may argue that the EPA approval of a SIP somehow transmutes it into federal law. There is nothing in the statute or legislative history to support that argument. In contrast, when Congress intended to give EPA the power to develop federal SIPs, it did so expressly and clearly defined the grounds and procedures for EPA action. *See* n. 4 above. EPA has not followed these statutory requirements in the present case.

federal courts have insisted that EPA respect state determinations as to the contents of SIPs.[17] Moreover, incorporation of state law into federal statutory enforcement schemes is not unique to the Clean Air Act.[18] Where an incorporation of state law into a federal statutory scheme exists, issues arising solely under such state law are not somehow transmitted into questions of federal common law, but are to be determined by reference to the decisions of the state courts.[19] That was the implicit holding of this Court in *Union Electric Co.* when it declined to permit an aspect of a SIP governed by state law to be challenged in federal court and suggested that the proper channel for review was the state court. It necessarily follows that federal enforcement of a SIP must respect state court interpretations of the validity of state SIP requirements under state law.

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[17] *See* Florida Power and Light Co. v. Costle, 650 F.2d 579, 588 (5th Cir. 1981) (EPA should defer to a state's interpretation of its SIP); Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984) (EPA may not, under the guise of partial approval of a SIP, change the substance of a SIP regulation).

[18] *See, e.g.*, Brea-Garcia v. I.N.S., 531 F.2d 693 (3d Cir. 1976) (meaning of term "adultery" in deportation statute governed by state law); United States v. Goings, 527 F.2d 183 (8th Cir.) (federal statute requiring state law to be applied in prosecutions on Indian reservation); Yeager v. Flemming, 282 F.2d 779 (5th Cir. 1960) (legality of marriage giving rise to benefits under the Social Security Act governed by state law); *cf.* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (priority of enforcement of federal lien governed by state law).

[19] *See* Yeager v. Flemming, *supra* (federal court bound to accept state court judgment that marriage was void *ab initio* under state law for purposes of Social Security Act); *cf.* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Similarly, there is nothing in either the language or legislative history of the Clean Air Act indicating that Congress intended the invalidity of state SIPs to be determined solely by reference to federal law simply because EPA has approved the SIPs.

III. The Decision Below Involves Recurring Questions Concerning Judicial Review And Enforcement Under The Clean Air Act

In a program as complex as the Clean Air Act, legal issues have and frequently will arise concerning the validity of various provisions adopted by the states and approved by EPA. It is important that all parties involved understand the means by which such provisions may be subject to judicial review. The decision below raises a host of problems concerning the implementation of the Clean Air Act. As a result of the conflict in the circuits on this important issue, the thousands of industrial facilities throughout this country that are subject to SIP requirements can have no certainty as to the legal effect of a successful state court challenge to a state plan.

This Court held in *Union Electric* that technological and economic feasibility issues could not be raised in a judicial review proceeding in federal court. The Sixth Circuit's decision here holds that, as far as federal enforcement is concerned, there is no judicial review of such issues in state court either. The result below is that once a state has promulgated a SIP, errors in its original promulgation—such as the erroneous assumption in this case that the SIP limitation imposed on Ford was technologically and economically achievable—are immune from any judicial review. In such a case there is the most literal denial of due process: there is no judicial process in which the validity of such a SIP may be reviewed.

The ultimate result of the conflict created by the decision below is total confusion as to the availability of judicial review of a SIP on technological and economic feasibility grounds. Considering that the importance and pervasiveness of the Clean Air Act's requirements, the burden of this

uncertainty on the courts, EPA, the states, and industry is truly staggering. Moreover, the "solutions" suggested by the Sixth Circuit serve to underscore the major impact of the decision below.

The Sixth Circuit first suggests that "technical infeasibility coupled with good faith efforts" can be considered by a federal district court to mitigate the imposition of monetary penalties in an enforcement action.[20] In other words, after a final determination of the factual issue of technological infeasibility in state court, a company would have to relitigate the issue of technological infeasibility in federal court in the context of mitigation of damages. Following this course would involve a huge waste of federal, judicial, governmental and private resources in relitigating the factual issues.[21] Moreover, the only scope of this "solution" is to permit the district court, on a discretionary basis, to consider the invalidity of the regulation in its decision as to the amount of penalties to be imposed for violation of the regulation. Such a result is analogous to telling a criminal defendant that he may not plead the invalidity of the law he is charged with violating in defense to the charges brought against him, but that once he is convicted he may ask the court to take the law's invalidity into consideration in determining his sentence.

The other "solution," according to the court below, is to seek EPA approval of a revised SIP, which when approved would replace the prior state rules.[22] The difficulty with this

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[20] Appendix to Ford petition at 9a.

[21] The Sixth Circuit has shifted to a federal forum issues that should be resolved in state courts. By contrast, the district court in this case believed that the case could be summarily resolved upon a showing that the state court had held the SIP invalid.

[22] Appendix to Ford petition at 8a.

suggestion is that the federal government takes the position that the prior SIP remains enforceable until EPA acts on the SIP revision. Since the Sixth Circuit has held that EPA may delay indefinitely in taking action on a SIP revision submitted by a state,[23] the uncertain possibility of obtaining a revised SIP at some time in the future is no comfort to a company facing immediate federal governmental and citizen suit for penalties and injunctive relief.[24]

In construing the Clean Air Act, federal and state judicial review and enforcement cannot be regarded as independent and unrelated instruments of justice. The Sixth Circuit's decision fails to appreciate the fundamental need to assure that the objectives of the Clean Air Act will be attained through coordinated federal and state actions. Congress intended that the Act be implemented in a manner consistent with the primary role of the states. Because the decision below does not give due regard to the appropriate function and effect of state court decisions acting within their sphere of exclusive competence, the mandate of Congress has been thwarted, and fundamental due process of law has been denied.

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[23] *See* United States v. National Steel Corp., 767 F.2d 1176, 1182 n.1 (6th Cir. 1985); *but see* American Cyanamid Co. v. EPA, 810 F.2d 493, 500 (5th Cir. 1987).

[24] This is particularly true in light of the fact that EPA has been notoriously slow to act on SIP revisions. *See* n.12 above.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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August 1987